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No. 81-3097

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOSEPH RILEY,
Petitioner-Appellee,

v.

FRANK H. GRAY, Supt.,
Respondent-Appellant.

ON APPEAL from the United States District Court for the Northern District of Ohio, Western Division.

Decided and Filed March 22, 1982.

Before: EDWARDS, Chief Judge, JONES, Circuit Judge; CELEBREZZE, Senior Circuit Judge.

CELEBREZZE, Senior Circuit Judge. This appeal raises questions concerning the scope of federal habeas corpus relief, 28 U.S.C. Sec. 2254, for violations of the fourth amendment. The district court issued the writ, finding that violations of the fourth amendment had occurred. The respondent-appellant, Frank H. Gray, appeals from the order granting the writ, asserting that *Stone v. Powell*, 428 U.S. 465 (1976), precludes review of the petitioner's fourth amendment claims in federal habeas proceedings and that the deterrent purpose of the exclusionary rule would not be served by excluding the evidence used to convict Riley. We believe that habeas relief was properly granted and, therefore, we affirm.

The petitioner occupied an apartment over the Red Owl Bar in Paulding, Ohio. On September 29, 1976, Police Officer Walter Heinrichs was summoned to the Red Owl, and upon arriving he found the petitioner lying in the doorway of the tavern, bleeding from a gunshot wound. Heinrichs went to the lavatory in the rear of the tavern, where he found James Christian, who indicated that he had accidentally shot Riley. Heinrichs asked to see the weapon which had been used. Christian led him through the tavern and to the door of the second floor apartment. The door, which was the only entrance to the apartment, was locked. Christian gave the key to Heinrichs.[1] Heinrichs opened the door, stepped inside and immediately noticed a revolver lying on the kitchen table. After making a cursory examination of the apartment, he left, closing and locking the door behind him. Heinrichs retained possession of the keys.

Shortly after this initial entry, the Chief of Police, Charles Watson, arrived at the Red Owl Bar. Using the key furnished by Heinrichs, Watson entered the apartment and saw the gun on the table, as well as blood on the floor. After this brief entry Heinrichs again locked the door.

The final warrantless entry was made by Heinrichs and Deputy Sheriff David Harrow. The Paulding Police Department had summoned Harrow because of his expertise in collecting and evaluating physical evidence. Harrow was to "process" the second floor apartment by removing, photographing, and evaluating any physical evidence which was found. While conducting the investi-

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1 Christian testified, in the hearing held by the district court, that he took Riley's keys as he was leaving the apartment, after having already shot Riley. Apparently, he picked up the keys and locked the door behind him.

gation, Harrow noticed a bullet hole in the wall between the kitchen and the bedroom. In an effort to find the bullet, Harrow entered the bedroom and discovered a variety of contraband, including automatic weapons, marijuana, and lysergic acid diethlamide (LSD). The officers immediately secured the apartment and left to obtain a search warrant. The officers indicated that they first learned that the apartment belonged to Joseph Riley when preparing the affidavits necessary to obtain the search warrant. The police obtained a warrant that evening, approximately five hours after Officer Heinrichs' initial entry.

After the contraband was seized, the Paulding County Grand Jury indicted Riley for aggravated trafficking, trafficking in marijuana, drug abuse, possession of a dangerous ordnance, and carrying a concealed weapon. Riley moved to suppress the contraband, but the motion was denied. Riley was convicted of aggravated trafficking, trafficking in marijuana, and drug abuse. Riley appealed to the Ohio Court of Appeals for the Third District and argued that the drugs should have been suppressed because they had been seized pursuant to a warrant based on information obtained in the warrantless search of his home, in violation of his fourth and fourteenth amendment rights. The Ohio Court of Appeals ruled that Riley lacked standing to challenge the search. The state did not raise the standing issue in the trial court and neither party briefed or argued the issue. The Ohio Supreme Court overruled Riley's motion for leave to appeal.

In May, 1979, Riley filed a petition for a writ of habeas corpus with the United States District Court for the Northern District of Ohio. The respondent filed a

return of the writ and argued that habeas review was precluded by *Stone v. Powell,* 428 U.S. 465 (1976). The matter was referred to a magistrate, who determined that habeas review was not precluded, and recommended that an evidentiary hearing be held. The district court adopted the magistrate's conclusion that *Stone* did not bar habeas review, held an evidentiary hearing, and concluded that the fourth amendment claim was without merit and should be dismissed. The petitioner filed a motion for reconsideration with the court, pointing out that *Mincey v. Arizona,* 437 U.S. 385 (1978), held that no "crime scene" exception to the warrant requirement exists. The district court reevaluated the record, determined that the search could not be justified on the basis of exigent circumstances or consent, and issued the writ.

The threshold issue is whether *Stone v. Powell,* 428 U.S. 465 (1976), prevents habeas review of the petitioner's fourth amendment claims. *Stone* precludes habeas review "where the State has provided an opportunity for full and fair litigation of a fourth amendment claim . . . ." *Id.* at 494. This circuit, in *Moore v. Cowan,* 560 F.2d 1298 (6th Cir. 1977), concluded that *Stone* did not require that the state court rule on the merits of each claim. *Id.* at 1302. Instead, we indicated that the state court need do not more than "take cognizance of the constitutional claim and rule in light thereof." *Id.* Thus, in deciding whether the petitioner received an opportunity for a full and fair hearing in the state court, we must determine whether the state court took "cognizance" of the petitioner's claim.

The respondent argues that *Stone* requires only that the state provide the procedural mechanism for the presentation of fourth amendment claims. The respondent asserts that the scope of our inquiry is limited to the

opportunity available in theory, and the opportunity which is in fact afforded to a particular litigant is of no consequence. *E.g., Caver v. Alabama*, 577 F.2d 1188, 1193 (5th Cir. 1978). For example, in *Williams v. Brown*, 609 F.2d 216 (5th Cir. 1980), the state court failed to reach the merits of the fourth amendment claim because of a procedural error. In affirming the district court's dismissal of the petition, the Fifth Circuit stated that "in the absence of allegations that the proceedings provided by a state to fully and fairly litigate fourth amendment claims are systematically applied in such a way as to prevent the actual litigation of fourth amendment claims . . . . *Stone* must apply with equal force to procedural mistakes that thwart the presentation of fourth amendment claims." *Id.* at 220. The inquiry is limited to the adequacy of the mechanism in the abstract; its effectiveness in a particular situation is not pertinent.[2]

The petitioner argues for a narrower interpretation of *Stone*. Essentially, he relies upon *Gamble v. Oklahoma*, 583 F.2d 1161 (10th Cir. 1978), in which the Tenth Circuit concluded that "[o]pportunity for full and fair consideration includes, but is not limited to, the procedural opportunity to raise or otherwise present a Fourth Amendment claim. It also includes the full and fair evidentiary hearing contemplated by *Townsend*. Furthermore, it contemplates recognition and at least colorable application of the correct fourth amendment constitutional standards." *Id.* at 1165. Thus, the Tenth Circuit reviews the merits of the fourth amendment claim, at least to determine if there was egregious error.

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2 The Seventh Circuit has adopted a similar position with respect to *Stone*. *See United States ex rel. Maxey v. Morris*, 591 F.2d 386, 388-89 (7th Cir. 1979) (procedural opportunity was all that *Stone* requires). The Seventh Circuit has not, however, faced a factual situation similar to *Williams*.

We believe that neither position is wholly satisfactory. The respondent's position is not entirely consistent with *Stone*. *Stone* is based on the perception that the exclusionary rule should not be applied in federal habeas review of a state conviction because of its limited utility in that setting. *Stone*, 428 U.S. at 494, 495. Implicit in the Court's analysis is the belief that if an issue has been considered at trial, and on direct appeal of the state court conviction, then the issue is close, involving nuances of the fourth amendment which may be too complex to allow easy application by police officers. In these situations, the special deterrent value of the exclusionary rule is at its nadir and should not be applied. *Id.* at 538-40 (White, J., dissenting). Thus, the value of reviewing these claims collaterally is small. *Stone* is predicated on the Court's assessment of the exclusionary rule's utility; application of the rule is justified when the state court denies the petitioner a full and fair opportunity to litigate his claims. *Id.* at 494. We perceive no difference in the utility of the exclusionary rule where an opportunity is frustrated because of an inadequate procedural mechanism or where an opportunity is frustrated because of the manner in which the mechanism is applied. In either instance, the consequence to the defendant is the same: an opportunity to litigate the claim has been denied because of a procedural shortcoming.

Similarly, we decline to adopt the petitioner's interpretation of *Stone*. We believe that a limited inquiry into the correctness of state court decisions, occurring as a matter of course in the district courts, would be inconsistent with *Stone*. *Id.* at 493 n.35. The language of *Gamble*, however, entails an examination of each state decision which precipitates a habeas petition. This case by case review is inconsistent with *Stone's* assumption that state courts are as capable of deciding fourth amend-

ment issues as federal courts. When a petitioner alleges egregious error in the application of fourth amendment principles, of a magnitude and nature similar to the state court error present in *Gamble*, however, a federal habeas court might be justified in concluding that an opportunity for a full and fair hearing had not been afforded the petitioner.

In our view, *Stone* and *Moore v. Cowan, supra*, require a district court to make two distinct inquiries in habeas proceedings. Initially, the district court must determine whether the state procedural mechanism, in the abstract, presents the opportunity to raise a fourth amendment claim. *Williams v. Brown*, 609 F.2d 216, 220 (5th Cir. 1980). Second, the court must determine whether presentation of the claim was in fact frustrated because of a failure of that mechanism. *See Boyd v. Mintz*, 631 F.2d 247, 250 (3rd Cir. 1980); *Gates v. Henderson*, 568 F.2d 830, 840 (2nd Cir. 1977) *(en banc)*, *cert. denied*, 434 U.S. 1038 (1978).[3]

The mechanism provided by the State of Ohio for the resolution of fourth amendment claims is, in the abstract, clearly adequate. Ohio R. Crim. P. 12 provides

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3 Of course, petitioner's opportunity to raise his claim may be legitimately frustrated by the state's procedural mechanism. For instance, the harmless error doctrine may legitimately frustrate the petitioner's claim by rendering his fourth amendment claim immaterial. *E.g. Moore v. Cowan*, 560 F.2d 1298, 1302 (6th Cir. 1977). Similarly, an independent and adequate state procedural ground may also legitimately serve to frustrate the petitioner's opportunity to raise a fourth amendment claim. *E.g., Gates v. Henderson*, 568 F.2d at 840. *See also Wainwright v. Sykes*, 433 U.S. 72 (1977).

an adequate opportunity to raise fourth amendment claims in the context of a pretrial motion to suppress, as is evident in the petitioner's use of that procedure. Further, a criminal defendant, who has unsuccessfully sought to suppress evidence, may take a direct appeal of that order, as of right, by filing a notice of appeal. *See* Ohio R. App. P. 3(A) and Ohio R. App. P. 5(A). These rules provide an adequate procedural mechanism for the litigation of fourth amendment claims because the state affords a litigant an opportunity to raise his claims in a fact-finding hearing and on direct appeal of an unfavorable decision. *See O'Berry v. Wainwright,* 546 F.2d 1204, 1213 (5th Cir. 1977).

The second part of the analysis addresses the problem here. The state appellate court held that the petitioner lacked standing to raise the fourth amendment claim. The parties did not brief or argue this issue, and it was not raised in the trial court.[4] The state appellate court, in its opinion, did not discuss or apply the rule of *Jones v. United States,* 362 U.S. 257 (1960), which had not yet been overruled by *United States v. Salvucci,* 448 U.S. 83 (1980). The Court in *Jones* held that a person, charged with an offense involving possession of contraband as one of its elements, need not show that he had standing to challenge the search.[5] *Id.* at 263-64. The state appellate

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4 *See State v. Morris,* 42 Ohio St. 2d 307, 329 N.E.2d 85 (1975) (Syllabus No. 1) (state's failure to raise standing amounts to a waiver).

5 The petitioner was convicted of one count of aggravated trafficking, Sec. 2925.03 (A) (6) of Ohio Rev. Code Ann.; one count of trafficking in marijuana, Sec. 2925.03 (A) (6) of Ohio Rev. Code Ann.; and three counts of drug abuse, Sec. 2925.11 (A) of Ohio Rev. Code Ann. Possession is a necessary element of each of these offenses. Further, the district court found, and the respondent does not dispute the finding, that petitioner does have standing to raise the fourth amendment claim.

court's failure to apply *Jones* made inquiry into the petitioner's standing necessary. After reviewing the transcript of the hearing, the appellate court concluded that because there was no evidence indicating that the petitioner had standing to challenge the search, it could not rule on the merits of the claim. While failure to apply the rule was perhaps understandable, the petitioner's reliance upon the rule was equally understandable, and the petitioner's reliance upon *Jones* in the trial court resulted in his failure to prove that he actually had standing.

We do not believe that the appellate court's failure to apply *Jones* denied the petitioner an opportunity for full and fair litigation, because its action may have been warranted in light of intervening decisions. *United States v. Hunter*, 550 F.2d 1066, 1072 (6th Cir. 1977). We believe, however, that the state appellate court frustrated the petitioner's opportunity to litigate his fourth amendment claims because it failed to remand the case to the trial court to allow the petitioner to establish his standing to challenge the search. Although such a remand is often not necessary, *e.g., United States v. Hunter, supra*, the record in this case indicates that the petitioner could have proven his standing to challenge the search[6] had he an-

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6 For example, questioning of the police officers indicated that the petitioner rented the apartment. Further, Officer Keith Baird indicated that "It was pretty common knowledge where he [the petitioner] lived for the last year," during trial, in response to an inquiry into the identity of the apartment's tenant. This record presents a situation which is decidedly different from cases such as *United States v. Hunter, supra*. In *Hunter*, the absence of standing was clear from the record before this court. Here, however, the Ohio Court of Appeals indicated that it would not rule on the merits of the petitioner's claim because Riley's standing was not clear from the record.

ticipated the appellate decision. Further, we believe that the petitioner's reliance upon *Jones* was justified, and that requiring him to anticipate the need to prove his standing in the trial court would be unreasonable. Consistent with our conclusion is the Supreme Court's disposition in *United States v. Salvucci*, 448 U.S. 83 (1980). In *Salvucci*, which finally overruled *Jones*, the Court remanded the case to allow the defendant to prove that he had "a legitimate expectation of privacy," for many of the same reasons we have just outlined. 448 U.S. at 95.

In sum, we believe that the district court's interpretation of *Stone* must be affirmed. We reach this conclusion, despite the facial adequacy of Ohio's procedural mechanism, because we believe that the procedure was applied in a manner that, through no fault of the petitioner, deprived him of an opportunity to fully litigate his claim. We hold that federal habeas relief is available when a criminal defendant is not allowed to fully present his fourth amendment claim in the state courts because of unanticipated and unforeseeable application of a procedural rule which prevents state court consideration of the merits of the claim.

Because we believe that the district court applied *Stone* correctly, we must review its decision on the merits of the petitioner's claim. The district court viewed the search, quite correctly, as warrantless, because a warrant was not obtained until after the contraband had been discovered. Warrantless searches are *per se* unreasonable under the fourth amendment, subject to only a few exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). Thus, the search of the petitioner's apartment is not valid unless the circumstances fit into one of the exceptions to the general warrant requirement.

The respondent relies upon the "consent" exception to the warrant requirement. He argues that Christian's consent allowed the police to search the petitioner's apartment, and that Christian's consent was knowingly and freely given. *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973); *Vale v. Louisiana*, 399 U.S. 30, 35 (1970). In order for the consent to be valid, the person giving the consent must have the authority to do so, *Stoner v. California*, 376 U.S. 483, 489 (1963), and the consent must be voluntarily given. *Schneckloth*, 412 U.S. at 223.

We believe Christian's consent was not valid because he lacked authority to permit a search of the apartment. A person may consent to a search if he possesses "common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974). The touchstone of common authority is "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that others have assumed the risk that one of their number might permit the common area to be searched." *Id.* at 171 n.7. With these factors as the focus of our analysis, we shall examine the extent of Christian's authority.

Christian did not live in the petitioner's apartment. Although he had known the petitioner for several years, he was not a regular visitor to the apartment and, except for the night of the shooting, he never had possession of the keys to the apartment. Finally, Christian testified that he did not have permission to enter the apartment when the petitioner was not there. The petitioner corroborated this testimony, and the respondent did not dispute it. In light of this testimony, we agree with the

district court's conclusion that Christian lacked authority to consent to the search. He had no right to use the property and did not have access or control for any purpose. Moreover, we refuse to infer that the petitioner "assumed the risk" that Christian would consent to a search merely by inviting Christian into his home. We hold that Christian was without authority to consent to the search of the petitioner's apartment and, therefore, that the warrantless search and subsequent seizure of the contraband was unlawful.[7]

Finally, the respondent argues that the deterrent purpose of the exclusionary rule would not be served by the suppression of the evidence seized in this case, because the officers had a reasonable, good faith belief that Christian had authority to consent to the search and that the search was lawful. Essentially, the respondent asks us to adopt the rule and rationale of *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) *(en banc), cert. denied*, 449 U.S. 1127 (1981). The Fifth Circuit in *Williams* considered the underlying purpose of the exclusionary rule and concluded that the exclusionary rule serves no deterrent purpose when the police illegally seize evidence because of a reasonable, good faith belief that they have acted properly. *Id.* at 847. Because we have concluded that the officers' belief that the search was proper was unreasonable under the circumstances, we need not decide whether such an exception exists. *See United States v. Downing*, 665 F.2d 404 (1st Cir. 1981).

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7 The respondent also argues that Christian had apparent authority to consent to the search because his possession of the keys caused the police officers to reasonably believe that he, in fact, possessed the requisite authority. This contention can be summarily dismissed. *Stoner v. California*, 376 U.S. 483, 488 (1964).

The officers' belief that Christian's implicit consent permitted them to enter the apartment was unreasonable. The only objective fact which ordinarily might suggest that Christian had authority to consent is his possession of the apartment key. Officer Heinrichs, Deputy Harrow, and Chief Watson testified that they did not know who lived in the apartment. Watson testified that he did not ask Christian whether the apartment belonged to him and that, to his knowledge, no one else asked that question. Harrow indicated that he was unaware whether permission for the search had even been given at all. The law is reasonably clear that there must be some sort of connection between the person consenting to the search and the area to be searched. *United States v. Matlock,* 415 U.S. at 171 n.7. Thus, the extent of Christian's dominion over the apartment was vital to his capacity to consent to the search. The failure of the police to inquire into that subject is unreasonable. If we were to hold that this course of conduct supports an objectively reasonable belief, then we would, in effect, be condoning deprivations of constitutional rights which are the result of negligent police conduct. Moreover, if we held that the police had a reasonable belief, we would, in effect, encourage the police to avoid inquiring into the facts of the situation. The exclusionary rule is designed to deter negligent, as well as wilful, deprivations of constitutional rights. *Michigan v. Tucker,* 417 U.S. 433, 447 (1974). Therefore, the failure to suppress evidence which is improperly obtained primarily because the police failed to inquire and ascertain the operative facts would be inconsistent with the deterrent purpose of the exclusionary rule.

The judgment of the district court is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C 79-280

JOSEPH RILEY,

Petitioner,

vs.

FRANK H. GRAY,
Superintendent, Ohio State Reformatory,

Respondent.

MEMORANDUM & ORDER

FILED, January 9, 1980, 4:35 p.m.

Carr, Magistrate:

This is a petition for a writ of habeas corpus, filed by the petitioner pursuant to 28 U.S.C. Section 2254. On October 11, 1979, this case was referred for a Magistrate's Report and Recommendation. Upon review of the entire file and the pleadings and arguments of the parties, it appears that review of this petition is not barred by the doctrine of *Stone v. Powell*, 428 U.S. 465 (1976). It further appears that, before a final determination of petitioner's claim can be made, an evidentiary hearing should be held.

In conformity with Rule 77(d) F.R.C.P. please take notice that the following order of judgment was entered in this Court on: January 10, 1980
James S. Gallas, Clerk

Petitioner seeks habeas corpus relief on the basis that evidence used to convict him of various narcotics offenses, for which he is presently in the respondent's custody, was seized in violation of his rights under the fourth amendment to be free from unreasonable searches and seizures. The record shows that petitioner moved to suppress this evidence in the trial court, and after a hearing the motion was denied. On appeal, the state appellate court ruled sua sponte that petitioner had failed to prove his standing at the suppression hearing, and thereupon overruled the assignment of error without reviewing or ruling on the merits of the petitioner's fourth amendment claims. The court of appeals considered other claims (not at issue in this case) raised by the petitioner, and affirmed the conviction. The Supreme Court of Ohio overruled petitioner's motion to that court for leave to appeal. A state court post-conviction petition was unsuccessful. Thus, petitioner has exhausted his state court remedies.

I. Stone v. Powell

The threshhold question in this case is whether the petitioner had a full and fair opportunity to litigate his fourth amendment claim in the state courts, in light of the decision of the state court of appeals that petitioner lacked standing, and its failure to address the merits of the petitioner's claims that the seizure of the narcotics was unconstitutional. This threshold question can be stated as follows: where a defendant has a full suppression hearing in the trial court, but is denied the opportunity for a decision by state reviewing courts, can he obtain habeas corpus review despite the restrictions imposed by *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037 (1976).

At the outset, it should be noted that the state appellate court disregarded applicable Ohio law when it

ruled sua sponte that petitioner lacked standing. The record shows that the prosecutor never contended that the petitioner was without standing. Under *State v. Morris,* 42 Ohio St. 2d 307, 329 N.E. 2d 85 (1975) (syllabus), where no challenge to standing is raised in the trial court, the prosecution is deemed to waive any objections to standing. Thus, even if the state had raised the standing question for the first time on appeal, the appellate court could not, under prevailing Ohio law, consider or rule on the question.

Moreover, it appears that the determination by the state appellate court that the petitioner lacked standing was erroneous under controlling Supreme Court decisions. The record shows that petitioner was charged and convicted of possessing controlled substances. Where possession is an essential element of the offense, the defendant is deemed to have "automatic" standing under *Jones v. United States,* 362 U.S. 257, 80 S. Ct. 725 (1960); *State v. Morris,* 42 Ohio St. 2d 307, 329 N.E. 2d 85 (1975). *See generally* 2 LaFavre Search and Seizure section 11.3(g) (1978). In addition, though not specifically disclosed at the suppression hearing (presumably because of the prosecutor's failure to challenge petitioner's standing), the trial record makes clear (Tr. 129), and it is undisputed in the instant case that the premises searched were occuped by the petitioner as his residence. In such circumstances petitioner's standing is clear. See *id.* section 11.3(a); *State v. Keeling,* 182 N.E. 2d 60 (C. P. Cuyahoga Cty. 1962).

In sum, petitioner's fourth amendment claim cannot be overcome in this court, nor could it be properly overruled in the state courts, on the basis that he lacked standing. In reaching its result, the state court of appeals disregarded applicable state procedural principles, see *Morris, supra,* and federal and state decisions which make petitioner's standing clear.

Nonetheless the question remains: Was *Stone v. Powell* satisfied by the full suppression hearing in the state trial court? In *Stone,* the Supreme Court held:

> Where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. 428 U.S. at 482, 96 S. Ct. at 3046.

With reference to the issue in the instant case – whether "full and fair litigation" requires an opportunity for a decision in a reviewing court, as well as in the trial court – the Court suggested in a footnote that an opportunity for appellate determination of the merits of a fourth amendment claim was a component of the requisite "full and fair litigation":

> We hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. 428 U.S. at 495, 96 S. Ct. at 3053 n.37.

Elsewhere in its opinion, the Court makes additional mention of consideration of claims at trial and on direct review. See 428 U.S. at 486, 489, 96 S. Ct. at 3048, 3050.

In the relatively few cases which have considered the question of the need for an opportunity for appellate review, federal courts have consistently held that to fulfill the "full and fair litigation" requirement of *Stone*, the states must allow determination at two levels. *Gamble v. Oklahoma*, 583 F.2d 1161 (10th Cir. 1978); *Mack v. Cupp*, 564 F.2d 898 (9th Cir. 1977); *Pulver v. Cunningham*, 419 F. Supp. 1221 (S.D. N.Y. 1976). Thus, the prevailing approach appears, as stated in *Pulver*, to be:

> that the opportunity to litigate encompasses more than an evidentiary hearing in the trial court. That is, it includes that corrective action available through the appellate process on direct review of the judgment of conviction. 419 F. Supp. at 1224.

In *Moore v. Cowan*, 560 F.2d 1298, 1301 (6th Cir. 1977), the Sixth Circuit has stated that a state appellate court must "take cognizance of the constitutional claim and render a decision in light thereof." *Moore* indicates that a state reviewing court need not expound upon a fourth amendment claim where it can be determined that the violation was harmless beyond a reasonable doubt. 560 F.2d at 1302.

On the record in the instant case, it cannot be said that the state court of appeals took cognizance of the constitutional claim and rendered a decision in light thereof, in view of that court's failure to follow state procedural requirements and controlling state and federal standing principles. Thus, it is apparent that, if directly presented with the issue in this case, the Sixth Circuit would adopt the approach of other federal courts and hold that *Stone v. Powell* does not restrict federal

habeas corpus review of the petitioner's claims in this case. Moreover, it is clear that the violation of petitioner's fourth amendment rights, if established, was not harmless.

II. Evidentiary Hearing

From the transcript of the suppression hearing it appears that petitioner's apartment was subjected to three distinct intrusions:

1. By Officer Heinrichs, in response to his request to James Christian to see the gun (Tr. 7-8, 17-22);
2. By Officer Heinrichs and Chief Watson (Tr. 10-12, 23-25, 33-34); and
3. By Officer Heinrichs and Deputy Harrow "to process the crime scene." (Tr. 12-15, 45-58).

The state contends that none of these intrusions required a prior search warrant because the record shows consent by James Christian.

The record developed at the suppression hearing shows, at most, however, that Christian's consent (assuming he (a) could and (b) did in fact consent) was responsive to direct and specific questions by Officer Heinrichs: "Where is the gun?" . . . I want to see it." (Tr. 7) This purpose was accomplished by the brief, only slightly intrusive first entry into the apartment (Tr. 8).

The present record, aside from reference to the fact that Christian accompanied Chief Watson and Officer Heinrichs when the second entry occurred (Tr. 10), contains no evidence regarding a further request for per-

mission to enter the apartment. By the time Deputy Harrow returned to conduct his investigation of the crime scene, Christian had left with Chief Watson (Tr. 34). It would not appear, therefore, that Christian consented to this activity, during which most, if not all of the narcotics were discovered (Tr. 46-51).

With reference to Christian's consent, the following questions appear pertinent:

1. Did Christian have actual authority from the petitioner to consent to the entry of others to petitioner's apartment?
2. If not, did he exhibit such apparent authority that the officers reasonably could conclude that he could consent to their entry?
3. Was Christian's consent voluntary in light of the totality of the circumstances?
4. What was the scope of the consent, assuming such was voluntarily given?

It does not appear from the record of the suppression hearing that sufficient evidence has been developed to enable this court to ascertain the answers to all of these questions. Therefore, an evidentiary hearing directed to developing such further evidence as the parties desire to submit concerning these four questions shall be held.

In denying suppression, the state trial court relied, in part on the fact that Deputy Harrow was investigating a crime scene when he observed the narcotics. Respondent has not addressed petitioner's arguments that no crime scene exception to the warrant requirement exists in

Ohio, or could exist under the prerequisites for an "exigent circumstances" search. It is unclear whether respondent concedes the validity of petitioner's arguments on this question. In light of such decision as *United States v. Mayes,* 518 F.2d 675, 678 (6th Cir. 1975), a concession that the entries into petitioner's apartment were not made in circumstances of exigency might be understandable. To enable a final determination of all questions, however, the respondent may, if he desires to do so at the evidentiary hearing, submit additional evidence concerning the existence of exigency beyond the evidence in the present record.

Therefore, for the foregoing reasons, it is hereby

ORDERED

That an evidentiary hearing will be held in Room 317B, United States Courthouse and Customshouse, Toledo, Ohio, on a date and at a time to be determined by the United States Magistrate.

So ordered.

/s/ James G. Carr
James G. Carr
United States Magistrate

Toledo, Ohio
January 9, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C 79-280

JOSEPH RILEY,

Petitioner,

vs.

FRANK H. GRAY, Supt.,

Respondent.

OPINION and ORDER

FILED, September 5, 1980, 11:49 a.m.

WALINSKI, J:

This cause came on for an evidentiary hearing on petitioner's claim that his Fourth Amendment rights were violated by an illegal search and seizure, resulting in his conviction for a possession offense involving controlled substances. The respondent vigorously opposes petitioner's claim.

The circumstances surrounding the events leading to the necessity for police searches are unusual.

Petitioner occupied an apartment over a tavern known as the Owl Bar in Paulding, Ohio. On the day in question, petitioner and several friends gathered at his apartment preparing to go shooting. Among the friends was one James Christian who, in the course of examining and preparing a handgun, caused it to discharge, striking the petitioner. The companions transported the peti-

tioner to the bar below, and called an ambulance and police. The shooting affected Christian to the point he was nauseous and vomiting.

When the police officer arrived, he asked Christian where the weapon in question was located. Christian, who had removed petitioner's keys, took the officer up to the apartment and handed him the keys. The officer unlocked the door, saw the weapon on a table, locked the door, and went back down to the bar to await his superiors.

When the Chief and another officer arrived, the three went back to the apartment, unlocked it, and began to examine the scene of the shooting. In the course of searching for the bullet, they noticed a hole in a wall and entered the next room to follow its course. In plain view on a dresser several suspicious articles were observed.

After consultation, the officers left the apartment for the purpose of obtaining a search warrant for the entire premises. After obtaining the search warrant, the officers returned to the apartment to search further and found what turned out to be controlled substances, leading eventually to petitioner's conviction. Christian was never brought to trial on the shooting incident.

Prior to trial, the trial court held a suppression hearing on petitioner's unlawful search and seizure claim, and overruled the motion to suppress. Since the record of the suppression hearing was minimal and the appellate court did not specifically address the Fourth Amendment claim, this Court, on the recommendation of the United States Magistrate, James Carr, granted an evidentiary hearing so that petitioner's Fourth Amendment claim would receive full consideration.

Respondent Gray raises as a basic issue the "standing" of the petitioner to challenge the seizure of contraband in petitioner's absence, citing *Stone v. Powell*, 428 U.S.C. 465 (1976).

This Court adopts the conclusion of the United States Magistrate and makes an independent finding that seizure of contraband which is later used in a possession prosecution can raise a Fourth Amendment challenge. In the *Powell, supra,* fact situations, both defendants had appellate review of their Fourth Amendment challenges. This Court will not go so far as to say that at least a two-step state court review is mandated by *Powell,* but under the unusual facts of this case, the evidentiary hearing to protect the petitioner's Fourth Amendment rights was warranted.

Under the exigent circumstances and the fact that the investigating officers had a duty to protect the scene of the shooting as a possible attempted homicide, the Court finds the first officer, acting under the apparent though non-existent authority of Christian to permit entry, made a reasonable and non-obtrusive look at the weapon, then awaited his superiors. This Court holds that the officer had probable cause to search the scene of the alleged crime. *Kirvelaitis v. Gray,* 513 F.2d 213 (6th Cir. 1975).

The second entry by the authorities, who were in possession of petitioner's keys from Christian, was with probable cause for the purpose of gathering evidence about the shooting and the weapon. When the officers saw contraband not related to the shooting, the officers did the proper thing in obtaining a search warrant for the entire premises before seizing the contraband.

Thus, the Court concludes that petitioner's Fourth Amendment rights were not violated. *Powell, supra; Kirvelaitis, supra,* and the recent decisions on similar subjective search problems, *United States v. Salvucci,* _____U.S._____, 27 Cr. L. 3241 (6/25/80); *Rawlings v. Kentucky,* _____U.S._____, 27 Cr. L. 3245 (6/25/80).

For the foregoing reasons, and that reasoning set forth in the Magistrate's recommendation, the petition is hereby dismissed with prejudice.

IT IS SO ORDERED.

/s/ J. Walinski
United States District Judge

Toledo, Ohio.
September 5, 1980.

In conformity with Rule 77(d) F.R.C.P. please take notice that the following order of judgment was entered in this Court on: September 5, 1980
James S. Gallas, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C 79-280

JOSEPH RILEY,

Petitioner,

vs.

FRANK H. GRAY, Supt.,

Respondent.

OPINION and ORDER

FILED, January 22, 1981, 1:51 p.m.

WALINSKI, J:

This cause came to be heard on Petitioner Joseph Riley's motion for relief from judgment pursuant to Rule 60(b)(1) and (6) of the Federal Rules of Civil Procedure. Subsequently petitioner filed a motion to amend his motion for relief from judgment to state that said motion was also brought pursuant to Rule 59(e). For good cause shown, said motion to amend is hereby granted.

Petitioner filed his petition for a writ of habeas corpus pursuant to 28 U.S.C. section 2254, which was referred to the Magistrate for a Report and Recommendation on October 11, 1979. On the recommendation of the United States Magistrate, James Carr, this Court granted an evidentiary hearing so that petitioner's Fourth

Amendment claim would receive full consideration. The evidentiary hearing was held on August 12, 1980, and this Court's order denying the petition for a writ of habeas corpus was filed on September 5, 1980.

Petitioner's present motion for relief from judgment specifically questions the fact pattern upon which this Court's decision was based. On reconsideration the Court finds that petitioner's motion is well taken and will accordingly state the corrected fact pattern and the legal consequences which flow therefrom.

Petitioner occupied an apartment over a tavern known as the Red Owl Bar in Paulding, Ohio. On September 29, 1976, the Paulding Village Police arrived at the entrance of the tavern in order to investigate the report of a shooting. Officer Walter Heinrichs found petitioner lying in the front doorway, losing blood from a gunshot wound. At the direction of the tavern owner, Officer Heinrichs proceeded to the lavatory where he found Mr. James Christian being physically sick in one of the stalls. Mr. Christian explained to the officer that he had shot petitioner by accident, and at that point Officer Heinrichs asked to see the gun that Christian had used.

Mr. Christian led Officer Heinrichs to the second floor apartment. There was only one entrance to this apartment which was locked. Christian, who had removed petitioner's keys, was shaking too hard to open the door so he handed the keys to Heinrichs. Heinrichs unlocked the door and took about two steps inside the apartment where he observed a revolver on the kitchen table. He looked quickly around the apartment and then left, locking the door and keeping the keys.

Very soon afterwards Chief of Police Charles Watson arrived at the scene whereupon the officers entered the apartment for a second time and again viewed the gun on the table and observed blood on the carpet. The officers again left the apartment and locked the door. The Chief then ordered his men to send for the mobile evidence van so they could process the crime scene. The mobile evidence van arrived shortly thereafter and the officers conducted an on the site investigation of the shooting during which physical evidence including other guns, suspected marihuana and drugs were found.

After consultation, the officers left the apartment for the purpose of obtaining a search warrant for the entire premises. After obtaining the search warrant, the officer returned to the apartment and seized what turned out to be controlled substances, leading eventually to petitioner's conviction.

The Fourth Amendment proscribes all unreasonable searches and seizures. Warrantless searches are *per se* unreasonable under the Fourth Amendment subject to only a few exceptions. *Katz v. United States,* 389 U.S. 347 (1967). A recent Supreme Court decision has dealt with the "crime scene" exception which respondent has relied on in this case.

In *Mincey v. Arizona,* 437 U.S. 385 (1978), the Supreme Court ruled that Arizona's "murder scene exception" to the warrant requirement was inconsistent with the Fourth and Fourteenth Amendments. In that case an undercover officer was shot and killed and two other persons were wounded during a narcotics raid on petitioner's apartment. The narcotics agents looked about quickly for other victims but refrained from further investigation, merely guarding the suspects and

the premises. Within ten minutes, however, homicide detectives arrived and took charge of the investigation. They conducted a warrantless search which lasted four days.

The Arizona Supreme Court held that the warrantless search of a homicide scene is permissible under the Fourth and Fourteenth Amendments. The United States Supreme Court rejected this argument and stated that:

> Except for the fact that the offense under investigation was a homicide, there were no exigent circumstances in this case * * * * There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility. And there is no suggestion that a search warrant could not easily and conveniently have been obtained. We decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search.

Id. at 394.

Thus there is no "crime scene" exception which would justify the warrantless search in this case. The first entry can be justified on the emergency exception to the warrant requirement. However, a warrantless search must be limited to only the exigencies upon which it is based. Certainly after the second entry it was clear that there were no other victims or assailants in the apart-

ment. The person who shot petitioner was known and was being detained by the police. There was no indication that evidence would be removed or destroyed, and there were plenty of police officers present to guard the apartment until a search warrant could be obtained. Therefore, the third entry and search, in which the narcotics were discovered, was impermissible under *Mincey*. In a most recent case the Sixth Circuit has specifically applied *Mincey* to a warrantless search situation. *United States v. Montano*, 613 F.2d 147 (6th Cir. 1980). *See also, United States v. Mayes*, 518 F.2d 675 (6th Cir. 1975).

The only other justification advanced by defendant for the warrantless search is that Mr. Christian consented to the search. It was clear from the hearing that although Mr. Christian may have appeared to have had authority to permit entry because he had possession of the keys, he had no actual authority. Therefore, the warrantless search cannot be justified on the basis of consent. *United States v. Matlock*, 415 U.S. 164 (1974); *United States v. Cook*, 530 F.2d 145 (7th Cir. 1979).

Since there is no valid exception to the warrant requirement in this case, the evidence seized in the warrantless search should have been suppressed.

For the foregoing reasons, and that reasoning set forth in the Magistrate's recommendation,

IT IS ORDERED that petitioner's motion for relief from judgment should be, and hereby is, granted.

IT IS FURTHER ORDERED that the petition should be, and hereby is, granted.

/s/ J. Walinski
United States District Judge

Toledo, Ohio.
January 22, 1981

In conformity with Rule 77(d) F.R.C.P. please take notice that the following order of judgment was entered in this Court on: January 22, 1981

James S. Gallas, Clerk

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

STATE OF OHIO, PLAINTIFF–APPELLE, v. JOSEPH RILEY, DEFENDANT–APPELLANT

MEMORANDUM OPINION

(No. 11-77-7 - Decided January 20, 1978)

APPEAL: Court of Appeals for Paulding County.

MR. J. DAVID WEBB, Prosecuting Attorney, for Appellee.

MR. RALPH DeNUNE III, for Appellant.

GUERNSEY, J. Appellant was indicted, tried and convicted in the Court of Common Pleas of Paulding County for the crimes of aggravated trafficking in drugs in violation of R.C. 2925.03(A)(6), trafficking in Marijuana in violation of R.C. 2925.03(A)(6) and of drug abuse in violation of R.C. 2925.11(A). He appeals assigning error in three particulars.

First Assignment of Error. "Denial of defendant-appellant's motion to suppress constituted prejudicial error since the warrant for the search of the defendant-appellant's house was not obtained until after the police had entered and searched the premises in violation of the defendant-appellant's rights under the fourth and fourteenth amendments to the United States Constitution."

On January 21, 1977, defendant filed his pre-trial motion "for an order suppressing all evidence seized by police authorities on or about the 29th day of September, 1976, from defendant's residence located at 117-1/2 W. Perry Street, Apt. 2, Paulding, Ohio," for the asserted reason that the warrant upon which seizure was made

was based on the affidavit of one Harrow upon information received by him as the result of a "warrantless, unreasonable search."

We are limited in our review of this motion and the ruling thereon to the transcript of the hearing on the motion where evidence was adduced that upon answering a police call Police Officer Heinrichs of the Village of Paulding found the defendant lying in the Red Owl Tavern with a gunshot wound in his body; that he inquired who did it and was directed to a restroom where he found one James Christian vomiting; that he asked Christian where the gun was and Christian said, "It's upstairs," and upon Christian being told that the officer wanted to see it, they proceeded out the door and up the stairs to a second floor apartment, and that Christian voluntarily unlocked and opened the door and they took about two steps inside the apartment and the officer saw a weapon lying on the table. There was further evidence adduced at the hearing on the motion that they left the apartment, secured the door, descended the stairs where the officer turned the keys over to the chief of police who momentarily visited the apartment after first placing Deputy Sheriff Harrow in charge of the on the site investigation; that Heinrichs, Christian and Harrow returned to the apartment where an on the site investigation of the shooting took place and physical evidence including other guns, suspected marijuana and drugs were found and seized.

Heinrichs was asked whether he knew "that this apartment upstairs belonged to one Joseph Riley," and "You didn't know that Joe Riley lived there." To each of these questions, which assumed facts not proved, Heinrichs answered in the negative, and the chief of

police was also asked whether he had "Joe Riley's permission to enter the apartment," which he also answered in the negative.

There was no evidence whatever adduced at the hearing on the motion to suppress of defendant Riley's connection with the apartment except that he was shot there, nor was there any evidence as to ownership or possession of the seized articles. On this state of the evidence the trial court overruled the motion to suppress the seized physical evidence.

The Fourth Amendment to the Constitution of the United States, extended by the operation of the Fourteenth Amendment to state criminal prosecutions, prescribes among other things:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated * * * * ."

Basic to the existence and enforcement of the constitutional right to be secure against unreasonable searches and seizures is the possessive, "their," connoting ownership, or at least the right of possession, of the "houses, papers and effects," and a person who has no ownership or right of possession of the premises inolved has no standing to claim the unreasonableness of the search and seizure.

In a pre-trial hearing of a motion to suppress evidence on the ground that it was illegally obtained the burden of proof or the burden of persuasion as to the matter of standing of the movant to claim the right which he seeks to enforce is upon the movant. Compare State

v. Kassow, 28 Ohio St. 2d 141, where in the third paragraph of the syllabus the Supreme Court held that upon the trial of the issues raised by a pre-trial motion to suppress a statement claiming that the statement was compelled by mistreatment, threat of disadvantage, or hope of reward, the burden is upon the movant to prove his claim in that respect.

Accordingly, there being no proof whatever that the defendant had any ownership or possessory interest in the apartment where the seized articles were found, he has not proved any standing to have their use in evidence suppressed and his first assignment of error is without merit. We find this independently of the possibility of the legality of the search due to the consent of Christian who exercised some dominion over the apartment. See Frazier v. Cupp, 394 U.S. 731, 89 S. Ct. 1420. Nor do we pass upon its reasonableness otherwise.

Second Assignment of Error. "Denial of defendant-appellant's motion in limine constituted error that seriously prejudiced defendant-appellant in the eyes of the jury, as it placed before them evidence of a crime for which the defendant-appellant was not charged, and which was neither relevant nor material to the issues at trial."

This assignment has reference to an oral motion made at the outset of trial claimed by defendant to be a request "that the State refrain from making any reference to the firearms in question, and that the firearms seized from Defendant-Appellant's home not be brought into the presence of the jury." The defendant further asserts that the motion was denied and the automatic weapons were brought before the jury and remained before them during the entire course of the proceedings.

Prior to the morning of trial defendant had also stood charged by indictment for the crime of possession of an automatic firearm in violation of R.C. 2923.17 but this charge was dismissed on the morning of trial for lack of timely prosecution.

Notwithstanding the assertions of the defendant the transcript of proceedings discloses at page 40 that the only motion made was "regarding any further questions by Mr. Webb going to the weapon or to the drugs that were found in the apartment on September 29, 1976, for the reason that we feel they were irrelevant to the matters at hand." No motion was made "that the firearms seized from Defendant-Appellant's home not be brought into the presence of the jury." The trial court overruled the motion and stated in further explanation, "I expect the officer to tell what was found. If, at the time he concludes his testimony, if you wish to have some ruling as to what part is relevant to the charges before the Court, the Court will consider that at that time."

The transcript then reveals that the automatic and other weapons were referred to without objection on pages 61, 80, 81, 82, 89, 90 and 107, but it does not appear from the transcript that they remained before the jury during the entire course of the proceedings. They were not offered into evidence and the usual reference to them in the testimony was as being among the items found in the apartment and inventoried by the investigating officer.

It is true that the presence of these weapons in the apartment has little bearing on the specific offenses for which the defendant was tried and found guilty except to

the degree which such presence may bear on the defendant's culpable state of mind. However, defense counsel did not sufficiently reserve the issue of the references to the firearms and their presence before the jury for review. In any event, there was a mass of other incriminating evidence specifically relating to the offenses for which the defendant was tried and found guilty which supported the verdicts on such offenses and it does not affirmatively appear that the defendant was, or could have been, prejudiced by the references to or the presence of the weapons. We find the assignment of error without merit.

Third Assignment of Error. "Denial of defendant-appellant's motion to compel the state to elect between counts 1 and 2 of the indictment was prejudicial error, as those two (2) counts charge a single identical offense."

Counts 1 and 2 of the indictment are identical except that count 1 charges possession of lysergic acid diethylamide (LSD) whereas count 2 charges the possession of marijuana (sic). The defendant claims that a conviction on these two counts is contrary to R.C. 2941.25 (A) and moved, at the close of all the evidence, that the prosecution be required to elect between the two counts.

R.C. 2941.25(A) prescribes:

> "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

R.C. 2925.03(A)(6), under which each count was lodged, prescribes:

"(A) No person shall knowingly do any of the following:

" * * * *

"(6) Possess a controlled substance in an amount equal to or exceeding three times the bulk amount.

R.C. 2925.01, incorporating by reference R.C. 3719.01 and R.C. 3719.41, defines "controlled substances" as including lysergic acid diethylamide (LSD) and marijuana.

The Supreme Court has interpreted the application of R.C. 2941.25(A) in Maumee v. Geiger, 45 Ohio St. 2d 238, primarily on the basis of its earlier decision in State v. Botta, 27 Ohio St. 2d 196. It concludes that there may not be a conviction when the two offenses, though one offense is not included in the other, are for all practical purposes merged to prevent shotgun convictions, the lesser crime being merged into the major. The doctrine of merger, however, consists of "the penal philosophy that a major crime often includes as inherent therein the component elements of other crimes."

Notwithstanding that by the penalty provisions of R.C. 2925.03(C) the crime of possession of LSD in an amount equal to or exceeding the bulk amount becomes the major crime of aggravated trafficking whereas the crime of possession of marijuana in an amount equal to or exceeding the bulk amount remains the offense of trafficking, a crime of lesser degree, it would not be possible to prove the former crime except by proof of possession of LSD, or the latter except by proof of the possession of Marijuana. Each offense is based on differ-

ent conduct. It will likewise be observed that the statute proscribes the possession of "a controlled substance," not the possession of "controlled substances."

In our opinion the two offenses here charged of which defendant was convicted do not come within the scope of the provisions of R.C. 2941.25. This assignment of error is, therefore, without merit.

Finding no error prejudicial to the defendant, appellant herein, in any of the particulars assigned and argued, the judgment must be affirmed.

JUDGMENT AFFIRMED.

MILLER, P.J. and COLE, J., concur.